IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 688

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,

Petitioner,

vs.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; SILVIO GUTIERREZ; NAPOLEON DUPOUY,

Respondents.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Argument in Opposition to Reasons for Granting the Writ.

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit enumerates four reasons why this Court should now review the decision below. It is this respondent's contention that the reasons set forth by the petitioner are not of sufficient significance to warrant this Court's exercise of its discretionary power of review.

The petitioner, before discussing his four reasons, presents the general proposition that a liberal interpretation is to be given to extradition treaties, relying on *Factor v. Laubenheimer*, 290 U. S. 276 (1933). That case does call for a liberal interpretation of extradition

treaties but the Court was therein concerned with the interpretation of provisions which in fact did exist in the treaty involved whereas the petitioner herein would have this Court so construe the present treaty as to read into it provisions which do not exist. The "liberal interpretation" concept advanced in *Factor v. Laubenheimer* should be viewed in the factual setting of that case; the strict interpretation urged on behalf of the accused would have made extradition depend upon the state in which the person to be extradited was found—an obviously unsatisfactory rationale of decision.

The petitioner's reason number 1 for the granting of the writ is, apparently, a conflict between the decisions of the Court of Appeals for the Second Circuit and the Court of Appeals for the Fifth Circuit.

Quite obviously the two decisions are not in conflict. It was only necessary for the Fifth Circuit to determine that a subpoena may not be served beyond one hundred miles; nothing more is necessary to support its decision. The petitioner argues that the Second Circuit has caused confusion because it was not "prepared to rule that there is no power to issue compulsory process," but again it is clear that the Court had no need of determining this issue to support its decision. The Second Circuit merely had to decide, as it did, that the power, if it exists, does not exist where the evidence sought is unnecessary. Certainly there is no conflict between or confusion inherent within the decisions of the two Courts.

The petitioner next argues that the Court of Appeals departed from the usual standard of good cause required to support a subpoena. Respondent respectfully sub-

mits that the Court departed from nothing; the "standard" urged by the petitioner and elucidated in the cases he cites is indeed the usual rule under the Federal Rules of Civil Procedure. We are presently concerned, however, not with compulsory process clearly available under the Federal Rules of Civil Procedure, but, rather, with whether compulsory process is available. Indeed, the petitioner states that one of the questions involved is whether there exists "the power to issue compulsory process *similar* to that provided for in the Federal Rules of Civil Procedure." (Page 3 of the Petition; emphasis added). The Court below did not attempt to set any new standard of good cause for the issuance of process under the Federal Rules of Civil Procedure, and its decision is not in conflict with the numerous authorities cited by the petitioner.

The petitioner does not indicate why the quantum of need or good cause necessary for compulsory process under the Civil Rules should apply to a case not governed by the Rules except by pointing out that in *Boeing Airplane Co. v. Coggeshall,* 280 F. 2d 654 (D. C. Cir., 1960), the subpoenaing by the Tax Court of certain United States Renegotiation Board documents was characterized as "an unusual procedure." (280 F. 2d at 659.) The petitioner thus reasons that because the Court of Appeals for the District of Columbia applied the usual "good cause" test to an "unusual procedure," the Court below should have applied the usual test to the "unusual procedure" sought in this case. The procedure in *Boeing Airplane,* however, was unusual only in that it would seldom be used; the subpoenas involved in *Boeing Airplane* were issued pursuant to express statutory authority, as noted by that

Court in its first footnote. The Court below was not dealing with such express authority or power and its decision is not in conflict with the cases cited by the petitioner.

The petitioner next contends that the Court of Appeals usurped the function of the District Judge.

To make such an argument is to wholly ignore the holding of the Court of Appeals and to muddy the factual situation with which it dealt. Certainly when a committing magistrate in an extradition proceeding deems the evidence sufficient to sustain the charge and so certifies to the Secretary of State, an appellate court does not have the power to review the determination of evidentiary sufficiency. Or, if, for example, the accused objects to the introduction of evidence based upon its mere cumulative effect, the committing magistrate's ruling is not subject to review.

In the instant case, however, the Court was dealing with an entirely distinct question—whether a committing magistrate in an extradition proceeding has the power to issue compulsory process.

Neither statute nor treaty grants such a power; moreover, not a single case has been cited by the petitioner wherein the existence of such a power has even been urged by a party. Then, too, the private transactions of third parties are involved here. The order giving judicial sanction to the petitioner's prying into the affairs of these depositors must surely be supported by reason.

The factual setting, then, in which the Court determined that a showing of need was necessary and that none had been made, consisted of a power existing, if at all, only by inference or analogy and the existence of the rights of other individuals. To say that the Court may not consider "need" under these circumstances requires greater tensibility than is possessed by the authority cited by the petitioner. In fact the extreme caution exercised by the Court below in its approach to the basic procedural innovation sought by the Petitioner is dictated by this Court in *Miner v. Atlass,* 363 U. S. 641 (1960).

The fourth reason stated by the petitioner again ignores the facts of the case. This is not, as petitioner seems to contend, an instance of the Court saying to the petitioner that he can present no further evidence to the committing magistrate because it would merely be cumulative. Nor is the Court saying to any of the sixty-six countries with which the United States has extradition treaties that it cannot present evidence of each crime charged to a person sought to be extradited, nor is it saying that the country cannot present cumulative evidence on any or all charges or counts. The Court has refused to sanction a basic procedural innovation under the circumstances of this case, wherein to do so would have furthered the petitioner's obvious quest for evidence of guilt to be used in a later proceeding and not just the probable cause thereof as is involved in an extradition proceeding, and wherein to do

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so would infringe upon the rights of innocent third parties. Such is the substance of the decision concerning which the petitioner seeks a review by this Court. This respondent submits that the decision below when properly interpreted correctly applies established legal principles and is in no way in conflict with the decisions of other Circuits.

Respectfully submitted,

WILSON B. COPES,

WELLMAN P. THAYER,

WILLIAM L. KUMLER,

Attorneys for Respondent Napoleon Dupouy.